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FAIRNESS TO CONTACT LENS CONSUMERS ACT

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HEARING

before the

SUBCOMMITTEE ON  
COMMERCE, TRADE, AND CONSUMER PROTECTION

of the

COMMITTEE ON ENERGY AND COMMERCE  
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

on

H.R. 2221

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SEPTEMBER 12, 2003

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FAIRNESS TO CONTACT LENS CONSUMERS ACT

TUESDAY, SEPTEMBER 9, 2003

House of Representatives,  
Committee on Energy and Commerce,  
Subcommittee on Commerce, Trade,

work with all interested parties to move this legislation forward in a positive fashion.

Mr. Stearns. Thank you.

Mr. Hubbard, welcome.

#### STATEMENT OF ROBERT L. HUBBARD

Mr. Hubbard. Good afternoon. Thanks for having me. It's a pleasure to be here.

I have been involved in this industry since March 1995. There's been far too much to discuss. And I apologize if I sometimes get into minutia or otherwise discuss items that really aren't as important here. I would prefer to respond to your questions. And otherwise I tried to provide written testimony that gave an overview of the position of the States and gave you some citations and the States would welcome any request for additional information, elaborate on some of the issues raised on that testimony and otherwise.

The summary of the written testimony is relatively straightforward. State attorneys general wholeheartedly support mandatory release of contact lens prescription. We have taken this position publicly.

The first example of this is in comments that the States gave to the FTC on the eyeglass rule at the time. And still the rule applies only to eyeglasses and mandates the release of prescriptions.

Back in 1997, we urged that it be extended to contact lenses. We thought that the reason it hadn't originally been extended to contact lenses had become outdated. And there have been other developments.

We think now 6 years later, it is even more so that that mandatory release is appropriate. Last year, 39 attorneys general joined a letter in support of the H.R. 2663, which supported mandatory release. And my testimony here today also renews that commitment to the State attorneys general in support for mandatory release of contact lens prescriptions.

The States have a lot of experience in this industry. In addition to the competition advocacy that I have summarized briefly, we have been engaged in a lot of litigation about this precise problem trying to ensure that competition is the rule of trade.

We have over time become quite skeptical of the health care claims that are made about the kind of difficulties that consumers face and the justifications for those restraints on health care. We have asked for and never gotten the kind of evidentiary support that we would find necessary to give those health care claims credence. We alleged in our litigation that such claims were deceptive. We were actively litigating that.

The settlement that we had in the disposable contact lens litigation addressed those deception concerns. We required that the AOA only make those health care claims when they were supported by data.

I just reiterate that health care claims have been made very since competition reared its head in this industry. And we would have expected there to have been a manifestation of those concerns and better documentation of them by now.

Finally, I note that I try to represent consumers. It's part of my job. It's what an attorney general tries to do. Consumers want their prescriptions. They want easy access to non-eye care practitioners in order to buy contact lenses. There is a significant economic and other benefit to consumers being provided that. And, as I mentioned before, there's no documented harm for consumers going to alternatives, instead of their ECPs.

And I also note that the complaints that we hear about almost always, if not always, come from the professionals, not from the consumers themselves. It's not consumers that are complaining that they got their lenses. It's always the computer who is complaining that someone else sold the lenses. Thank you very much.

[The prepared statement of Robert L. Hubbard follows:]

Prepared Statement of Robert L. Hubbard <SUP>1</SUP>

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\\1\ Director of Litigation, Antitrust Bureau, New York State Department of Law. I also serve as Chair of Plaintiff States' Steering Committee in the Disposable Contact Lens Antitrust Litigation, MDL 1030 (M.D. Fla.) and Chair of the Contact Lens Working Group of the NAAG Antitrust Task Force.  
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I am pleased to testify here today on H.R. 2221. The States wholeheartedly support federal legislation that requires eye care practitioners (ECPs) to release contact lens prescriptions, which H.R. 2221 does. Unlike most physicians, eye care practitioners sell what they prescribe. Thus, individual ECPs derive substantial revenue from the sale of replacement contact lenses and have an economic incentive to withhold prescriptions from customers to prevent consumers from shopping for replacement lenses elsewhere. In light of that incentive and the power of ECPs over prescriptions, the bill helps give consumers what they need to make their own choices about where to buy replacement contact lenses.

in re disposable contact lens antitrust litigation

As part of enforcing antitrust and consumer protection laws, state Attorneys General have an interest in maintaining open and competitive markets and have long been focused on markets for the sale of contact lenses. The most significant manifestation of that interest is In re Disposable Contact Lens Antitrust Litigation, which involves 32 States <SUP>2</SUP> and a certified class in the Middle District of Florida, Jacksonville Division, in front of United States District Judge Harvey Schlesinger. In that litigation, plaintiffs alleged the high price and limited availability of replacement contact lenses resulted from illegal collusion among contact lens manufacturers (Johnson & Johnson Vision Products, Inc. d/b/a Vistakon (J&J), Bausch & Lomb, Inc. (B&L), and CIBA Vision Corp. (CIBA)), the American Optometric Association (AOA), other groups of optometrists, and 13 individual optometrists. Plaintiffs charged that the illegal agreement made it more costly and difficult for consumers to buy replacement contact lenses from mail order firms or pharmacies.

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\\2\ Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine,

So, on the one hand, you have people forced to get an affirmative response from the doctor's office every single time. And, as a result, doctors can veto their choice to buy by doing nothing, by just not responding.

Under a presumed verification system, the doctor has a motivation to tell us we can't sell, right? So they tell us if there is any problem with the prescription, if it's expired, if it's invalid, whatever the problem is with the prescription. If they can tell us, you can believe they tell us absolutely every time.

In California, for instance, 25 percent of the time, we are not able to fill the order because we are told by 2 p.m. the following day, which is California law, that there is a problem with the prescription and we don't----

Mr. Terry. I want to get Dr. Cummings to have a response to your presumed verification. That sounds like a reasonable middle ground here.

Mr. Cummings. Well, there's a challenge with presumed verification. I could give you an Internet address, and you could take the numbers off of a box like this, maybe a spouse or a son or a daughter or a friend, and call them up and get contact lenses dispensed to you. And the problem with passive verification is that people will get contact lenses without a prescription.

Now, the number may be less, but people will be able to get contact lenses, either over the Internet or from other suppliers, without having a valid contact lens prescription. That's the down side, too.

Mr. Terry. How about the California version, where there is period of time in which to verify and then they can presume verification if there is no reply. So you can't game the system, like some of the eye physicians in Texas do.

Mr. Cummings. Sure. One of the problems I see with the California--I think the California is good in many respects because it addresses many of the issues around the release of the contact lens prescription and that type of thing, which we feel is good.

The problem is I still think you can game the system with the passive system in California. And I think that some of the suppliers of the lenses will be able to continue to provide lenses to people who either have expired or don't even have contact lens prescriptions or as in the case that I mentioned in my testimony, that they substitute a lens that was inappropriate for them.

So the potential exists in a passive verification system to still have that happen.

Mr. Terry. I know my time is up, but let me just conclude with this last question. So it would be the position of the American Optometric Association that you don't want any form of presumptive with the time, but you are willing to go with some sort of heavy penalties perhaps to the eye physician if they don't verify within a time period?

Mr. Cummings. Yes.

Mr. Hubbard. If I might add, Mr. Coon mentioned that we were engaged in enforcement proceedings. There was a lot of stuff that went on in the disposable contact lens litigation, including arguments that the practices of companies like 1-800

were illegal.

There have been many complaints to State boards throughout the country that it is illegal. No board that I am aware of has ever proceeded against that system for I think very valid reasons, which is they don't show consumer harm from it or anything else.

The point is that consumers should not be stuck in the middle of this. The consumer should not be burdened by a non-responsive ECP. If it's the ECP's problem, they are notified of that. They have an opportunity to correct errors. An ECP shouldn't be allowed to with silence veto a sale by a competitor just because it's anti-competitive or they're inefficient or they're non-responsive.

If there's a problem with 1-800 not doing the verification that they say is required, there is a way to deal with that. The problem is that in the positive verification format, it is the consumer and the consumer primarily who suffers.

Mr. Terry. Thank you.

Mr. Stearns. We're going to do a second round. Mr. Burr? We will let Mr. Burr, who was the author of the bill, go ahead.

Mr. Burr. Mr. Chairman, thank you. I appreciate the indulgence of my colleagues since I am not a member of this subcommittee.

Mr. Hubbard, let me ask you just one question. Why is this so confusing to get to an end on a legislative remedy?

Mr. Hubbard. I don't know. Maybe it's my articulateness is not as good as it should be. It is different I think than a whole lot of industries. It is correct that very few doctors sell what they prescribe. It creates a whole different series of incentives.

There are many ways that you can make it hard for consumers to get their prescription. One of the parts of the litigation was they would train one another about how you wouldn't let the prescription walk out the door.

There are a lot of subtleties that arise because of this incentive and that a large proportion, a significant proportion, of an ECP's revenue comes from the sale of these contact lenses. And that's what creates the significant problem, I think.

Mr. Burr. So what you're telling me is it's financial?

Mr. Hubbard. Yes. It's undeniable that the business strength of some ECPs depends in large measure on the number of contact lenses that they sell.

Mr. Burr. Certainly optometrists suggest that this is about patient care, that it's all about patient care. In essence, to listen to them, you can't rely on a prescription that they write to either be filled in the right way or for a patient to handle that prescription with a correct vendor.

Mr. Hubbard. Well, I think that consumers are able to do that. I think that a prescription needs only a few parameters in order to specify what lens should be sold.

Certainly the ocular health of consumers is something that interests the attorney generals. And we certainly were asked by our bosses to make sure that the position that we were taking in the litigation was not risking the ocular health of consumers. And we took those concerns very seriously.

We always when we had an optometrist under oath said,



"What evidence of ocular health risks are there? Can you document that?" That was always what we asked. And we never got documentation of those risks.

We take ocular health concerns very seriously. And we looked at those in a lot of depth. We don't profess to be medical doctors. But we think that the passive verification fulfills the purposes that consumers are entitled to.

Mr. Burr. You certainly are the only one at the table, I believe, that has litigated something relative to this. Let me ask you, the results of that litigation basically required what to take place?

Mr. Hubbard. Well, there was a whole series of we allege that there were damages, there were benefits packages, other things. I think your question mostly focuses on the kind of injunctive relief that we had.

With the manufacturers, we required reasonable and nondiscriminatory sales to mail order and pharmacies along with everybody else. So that was J&J, B&L, Ciba.

As to the AOA, we had various claims. There is a provision that they shall not oppose prescription release. There is a provision that they shall not make health care claims unless it's supported by valid statistical data. Those were the kinds of provisions that we put in the settlement were the results of that litigation.

Those settlements are publicly available. I would be more than happy to give you----

Mr. Burr. Is it your belief that we need to pass this legislation to assure that patients across this country have an option other than their ECP for their contact lenses?

Mr. Hubbard. This would be a significant step forward, yes.

Mr. Burr. Mr. Coon, how does 1-800 currently request doctor verification?

Mr. Coon. Well, the best system that we have found works the best, which we do in a majority of our orders--and there has been criticism of phone automated systems and other things. The system that works the best is in writing by fax. We know that there is a confirmation that it was received. And that's the system that we would recommend.

Mr. Burr. And if, for some reason, there was not a response, which clearly is a problem today, can you give us an idea from 1-800's perspective? How much of the time does that happen?

Mr. Coon. Well, it depends on what the law is in the different States, like in Texas, over half the time, we cancel the order. It's a fax, too, but it's a positive verification system. And so over half the time, the eye doctor doesn't respond.

The data, the statistics aren't that much different in a presumed verification State like California. The difference is they tell us if there is a problem. They don't tell us if there is no problem. In fact, that is acceptable in California because by 2 p.m. the following afternoon, it's just one more thing the doctor doesn't have to do. If they pull the record up, the prescription is current and it's valid. They don't have to respond, you know, if there is not a problem.

I would point out that in either system, again, the doctor has ample opportunity to tell us that we can't fill an order.

If there's any problem at all with that prescription, we know that is a valid doctor's name and phone number, we know that is a valid fax; we know they have received the communication. And if they tell us that there is a problem with the prescription, we will not fill it.

Mr. Burr. Mr. Chairman, I realize I have run out of time. And I think we are going to have----

Mr. Stearns. We are going to have a second round, yes.

Mr. Burr. Thank you. I yield back.

Mr. Stearns. All right. I will do just a few questions, and then we will go around again. Mr. Hubbard, let's see if we can get to the point here. If you had to recommend a verification standard, would you today recommend an active or passive standard?

Mr. Hubbard. Passive.

Mr. Stearns. Active?

Mr. Hubbard. I said passive.

Mr. Stearns. Passive, passive.

Mr. Hubbard. And, Your Honor, I note that the litigating States or 32 of us, we took that position in enforcement proceedings after the settlement. We took the position that the settlement wasn't being followed and that the primary dispute in that was whether positive verification was required or passive was enough. And we took the position as a group of States that passive verification was sufficient.

Mr. Stearns. Would you support preemption of State law?

Mr. Hubbard. Well, you know I represent a State. And preemption is an extremely hot issue, and it depends very much on the details. I would have to know what you are talking about and----

Mr. Stearns. How about this bill, dealing with this bill?

Mr. Hubbard. Well, in the current version of the bill, I don't see preemption of any State laws.

Mr. Stearns. But if we did include it in the bill.

Mr. Hubbard. What would be the nature of the preemption?

Mr. Stearns. For the passive system which you are talking about.

Mr. Hubbard. So that to the extent there was a positive system in a State, it would be overridden by the passive?

Mr. Stearns. Yes. So you have in the bill the passive standard and it would preempt State laws.

Mr. Hubbard. Well, I can with confidence say that that would be fine with the State of New York. I have not discussed that issue with other States.

Mr. Stearns. With your boss.

Mr. Hubbard. The position that we took in the litigation was that 1-800 system was appropriate under the law of all of the litigating States, that be Arkansas, that be a whole series of States. That's an acceptable procedure. So by definition, the passing of Federal law that permits passive verification does not preempt State law because State law currently permits passive verification.

Mr. Stearns. Okay. Ms. Gadhia, according to your study, some eye doctors require a patient to sign up for a long-term contract of ongoing care. And if they are not available for that ongoing care, they cannot have their prescriptions. What is the medical rationale for this practice? And how prevalent

Mr. Terry. How about private right of remedy?

Mr. Cummings. And, as Mr. Hubbard said, certainly there are going to be a few consumers in that process that would get caught while you work through that process. But I do not believe with those kinds of penalties and sanctions and also the possibility of losing your license, that it would take too long to work through that process.

Mr. Terry. Thank you.

Mr. Stearns. The author of the bill, Mr. Burr?

Mr. Burr. Thank you, Mr. Chairman. I forgot earlier to ask unanimous consent that my opening statement be included in the record.

Mr. Stearns. By unanimous consent, so ordered.

Mr. Burr. I thank the gentleman.

Ms. Venable, let me just say I heard your comments as it related to patients in Texas who didn't feel like they had necessarily been heard or that their complaints had been acted on. Let me suggest to my colleagues if they question whether this is a problem, this is one of six stacks of postcards that I have received in the last year relative to individuals who feel this is important to them.

This is not an attempt to run optometrists out of business. I mean, to some degree, I am amazed at the level of fight that there is on what I think is a real simple piece of legislation. It's one that says let's let patients decide. You look at their eyes. You determine what their needs are.

You know, I went to the dentist yesterday morning. They made an appointment for me 6 months from now, I think. Chances are I'll probably change it three or four times. But I get to make that decision. The dentist would probably love to see me every 3 months, but I'm the one who pays. And I get to choose which dentist. I get to shop to some degree. And I base it upon what it costs and the service that's performed.

That's all we're talking about here. We're letting individuals who need contact lenses. I happen to use one of them. I don't need two. I haven't quite figured that out. I wouldn't have figured it out by myself. It was my optometrist who figured it out. But by the same token, I would like to buy the one at the least expensive place that I can.

And I'm not sure from the standpoint of optometrists what makes you think you have the right to sell what you prescribe. We have a history up here started with Congressman Pete Stark that when we solve problems that cost the system too much money, we begin to make some rules and regulations that I don't always agree with. And I have tried to change some of them.

Let me just sort of send a shot across the bow that in the absence of us trying to find a way to work together, this is where we end up. And we're not always quick to go back and fix some of our mistakes.

Let me ask Mr. Beales. If this legislation were amended to include passive verification, is there a need then to increase the enforcement mechanism in this bill, do you think?

Mr. Beales. Well, I think passive verification is much easier to enforce because it is in many respects self-enforcing. The place where we would need to focus our enforcement efforts would be on the providers to make sure that they were seeking the passive verification, but that's a

relatively small number of people, as opposed to having to visit each potential eye care provider to see whether, in fact, they're responding to verifications. It would be a much simpler problem.

Mr. Burr. And if I remember correctly--and somebody correct me if I am wrong--currently to fill or to sell a contact lens without a prescription exposes somebody to a significant fine. Am I correct? Does anybody object to that?

Mr. Hubbard. No. That's true.

Mr. Burr. Is that true, Dr. Cummings?

Mr. Cummings. Yes.

Mr. Burr. So only somebody with the intent of deceiving most of the time would expose themselves to that fine?

Mr. Hubbard. Unfortunately, the mechanism's in place to impose that fine. But it's never been acted upon. The FDA has not acted upon fining people for doing that. But it is there.

Mr. Burr. And do you know that the offer was made to strengthen it in this legislation? An optometrist declined the offer, which really makes me as the author of the bill if everybody's intent is to actually focus on the patients to solve some of the problems that we are dealing with. They may not be yours. They're somebody's. They happened to have found their way to my office.

That's what we're supposed to respond to, people who feel that they have a problem. I don't think there's any question we can do it better than we do it today.

Mr. Chairman, I thank you for holding this hearing. I thank all of my colleagues for their indulgence. But I also encourage you that now is a good time that we ask Chairman Tauzin to mark this legislation up or for you to mark it up and then for us to mark it up in full committee. And I assure the Chair that he will have my full support as we try to do that. And I yield back.

Mr. Stearns. And I thank the gentleman and for his cogent bill here. I think the hearing has brought out that there is a lot of support and need for this type of bill.

I would conclude by just asking Dr. Cummings, if we included in this bill a passive standard verification, would you support the bill?

Mr. Cummings. I don't think that a passive verification is something that we could totally support.

Mr. Stearns. So you are saying unequivocally you could not support it? I mean, is there a way we could tweak this with a passive verification that would make it acceptable to you?

Mr. Cummings. I think there is always room to look at options and try and work out something that is acceptable to us, but a--and we would be more than willing to sit down and work with you.

Mr. Stearns. I appreciate your help here. We certainly want to reach out to get professional people like yourself involved and not move without your feedback.

So we appreciate all of our witnesses today for coming. And with that, the subcommittee is adjourned.

[Whereupon, at 2:45 p.m., the hearing was adjourned.]